

UNITED STATES
v.
PAUL P. FISHER AND BUEL B. FISHER

IBLA 78-397

Decided September 22, 1978

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring the Ishpuk a/k/a Ishpuk Placer Mining Claim to be null and void (Contest No. CA-3744).

Affirmed.

1. Administrative Practice—Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Hearings—Constitutional Law: Due Process

In an administrative hearing to determine the validity of a mining claim, the requirements of due process are satisfied when notice and opportunity for an impartial hearing are provided in accordance with the Administrative Procedure Act. 5 U.S.C. §§ 551 et seq. (1976).

2. Administrative Practice—Administrative Procedure: Administrative Procedure Act

The procedures followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases are in full compliance with the Administrative Procedure Act.

3. Administrative Practice—Administrative Procedure: Hearings

The mere fact that the witnesses, the administrative law judge, and members of the Board of Land Appeals are employees of the Department of the Interior does not establish unfairness in the contest proceeding.

4. Administrative Practice—Administrative Procedure: Hearings

A Forest Service mineral examiner who is a witness in a Government contest of a mining claim is not disqualified nor is his testimony discredited merely because he is an employee of that agency.

5. Administrative Practice—Administrative Procedure: Hearings—Administrative Procedure: Hearing Examiners

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside for bias, a substantial showing of personal bias must be made.

6. Administrative Practice—Administrative Procedure: Hearings—Administrative Procedure: Initial Decision—Secretary's Authority: Generally

The Secretary of the Interior has plenary authority over the public lands, including mineral lands, and has been entrusted with the function of making the initial determination of the validity of claims against such lands.

7. Constitutional Law: Generally—Contests and Protests: Generally

The seventh amendment right to a jury trial does not extend to administrative proceedings, such as mining claim contests, where statutory rights adjudicated therein were unknown at common law.

8. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

To constitute a discovery on a mining claim, there must be shown to exist minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a profitable mine.

9. Mining Claims: Contests--Mining Claims: Determination of Validity

A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found evidence of mineralization insufficient to support a finding of a discovery.

10. Mining Claims: Discovery: Generally

A Government mineral examiner in determining the validity of a mining claim need only examine the claim to verify whether the claimants have made a discovery and is not required to perform discovery work, to explore or sample beyond the claimants' workings, or to rehabilitate alleged discovery cuts to establish the Government's prima facie case.

APPEARANCES: Fred W. Burton, Esq., Yreka, California, for the contestees.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Contestees appeal from a decision by Administrative Law Judge E. Kendall Clarke of April 5, 1978, declaring the Ishpuk a/k/a Ishpuk Placer Mining Claim to be null and void.

This contest was initiated by a complaint filed by the Bureau of Land Management (BLM) at the recommendation of the United States Forest Service. The complaint alleged:

- (1) There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery.
- (2) The land embraced within the claim is nonmineral in character.

Contestees filed an answer denying the material allegations of the complaint, and the matter was heard on March 15, 1977. On April 5, 1978, Judge Clarke rendered his decision holding that the Government had presented a prima facie case of the invalidity of the claim which the appellants had not overcome.

The appellants set forth the following arguments on appeal:

(1) Denial of appellants' motion to disqualify the administrative law judge in favor of a United States magistrate deprived appellants of a neutral hearing officer. Appellants charge that the Department of the Interior is at one and the same time the contestant and the employer of the hearing officer assigned to hear the contest.

(2) Due process, equal protection, and privileges and immunities are violated by the Department's participation in the contest as contestant and employer of the hearing officer assigned to hear the contest.

(3) The Department of the Interior has no jurisdiction to hear a contest of a mining claim, because it is a part of the executive branch and as such does not possess adjudicatory powers.

(4) Contestees were denied the right of a trial by jury in an action involving property rights.

(5) The Contestant did not make a prima facie case in establishing that a discovery does not exist on the contested claim.

We reject each of the appellants' contentions and affirm the decision below.

[1, 2] The argument that procedural due process is violated by the fact that the Department of the Interior is at one and the same time the contestant and the employer of the administrative law judge has been answered in United States v. Bass, 6 IBLA 113 (1972).

Therein, BLM, at the recommendation of the Forest Service, filed a complaint contesting the validity of a mining claim. At a hearing before a Department of the Interior hearing examiner, the contest was prosecuted by an attorney from the Department of Agriculture.

The charge that the Constitution, specifically the due process clause, was violated by the participation of the various Government agencies is rejected.

In an administrative hearing to determine the validity of a mining claim, the requirements of due process are satisfied when notice and opportunity for an impartial hearing are provided in accordance with the Administrative Procedure Act. 5 U.S.C. §§ 551 et seq. (1970). The procedure followed herein in the initiation, prosecution, and deciding of mining contest cases was in compliance with the Act. United States v. McCall, 1 IBLA 115 (1970).

United States v. Bass, supra at 117; United States v. Dummar, 9 IBLA 308 (1973).

The participation by the Government in the present case is identical to that in Bass, *supra*.

[3] In United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974), a complaint was filed by BLM to determine the validity of mining claims, and a hearing was subsequently conducted by an administrative law judge of the Department. Therein, this Board stated: "[T]he mere fact the witnesses, the Administrative Law Judge, and Members of this Board are employees of the Department of the Interior does not establish unfairness in the contest proceeding" (at page 387).

[4] In United States v. Zerwekh, 9 IBLA 172 (1973), we held that a BLM mineral examiner who is a witness in a Government contest of a mining claim is not disqualified nor is his testimony to be discredited merely because he is an employee of that agency.

In the present case the Government witness was an employee of the United States Forest Service, Department of Agriculture. Thus, the possibility for unfairness or bias in favor of the Department of the Interior is lessened by the fact that the witness is employed by a department other than Interior. See United States v. Gayanich, 361 IBLA 111 (1978).

Administrative due process is satisfied whenever a mining claimant is afforded adequate notice and an opportunity for a fair hearing. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920).

The procedure followed by the Department in initiating, prosecuting and deciding contests in mining cases does not violate 5 U.S.C. § 554, which forbids those engaged in investigative or prosecuting functions to participate or advise in the decision. United States v. Mullin, 2 IBLA 134 (1971).

[5] In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside for bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient. Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), *aff'd on other grounds*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

Appellants were represented by counsel at their hearing and presented evidence to establish the validity of their claim. Further, counsel for appellants participated in cross-examination of Government witnesses. The record in this case is lacking in evidence to show a denial of due process.

[6] Appellants' contention that the Department of the Interior has no jurisdiction to adjudicate a mining contest has been rejected on several prior occasions.

The Secretary of the Interior has plenary authority over the public lands, including mineral lands, and has been entrusted with the function of making the initial determination of the validity of claims against such lands, to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. So long as the legal title remains in the Government, it does have power, after proper notice and adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. 43 U.S.C. §§ 1201, 1457 (1970); Cameron v. United States, *supra*; Best v. Humboldt Placer Mining Co., *supra*.

It is well established that the Department may determine the validity of mining claims by an administrative contest proceeding which provides the claimant the right to a hearing before a qualified hearing officer. United States v. Stevens, *supra*. Judge Clarke is a fully qualified hearing officer, appointed pursuant to 5 U.S.C. § 3105, and authorized to conduct hearings under the Administrative Procedure Act, 5 U.S.C. § 556 (1976).

[7] Appellants' contention that they were denied their seventh amendment right to a jury trial is also without merit. Statutory rights adjudicated in administrative proceedings, such as mining claim contests, were unknown at common law, and the amendment does not extend to such quasi-judicial administrative proceedings. United States v. Gayanich, *supra*; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); McFerren v. County Board of Education of Fayette County, 455 F.2d 199, 202-203, (6th Cir. 1972); Lowry v. Whitaker Cable Corp., 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); Melancon v. McKeithen, 345 F. Supp. 1025, 1041 (E.D. La. 1972); Farmers' Livestock Commission Co. v. United States, 54 F.2d 375, 378 (E.D. Ill. 1931); 1 K. Davis, Administrative Law Treatise, 594 (1958).

[8] Appellants' final contention on appeal is that the Government did not make a prima facie case for the invalidity of the claim because its witnesses did not test the claim site in a proper manner.

At the hearing Emmett Ball, a fully qualified mining engineer of the United States Forest Service, testified that he examined the claim site in question on three occasions. He further testified that contestees had no open sites for him to sample and he therefore made his determination as to the validity of the claim by "sniping," i.e., extracting small amounts of gravel from behind boulders.

The results of Ball's sampling indicated that the claim site had a value of five cents per yard when considering the costs of moving

the large boulders thereon. In his opinion, a prudent man would not be justified in expending his time and labor with a prospect of developing a paying mine.

The validity of a claim is dependent upon the existence of a discovery on the claim site. A discovery exists where: "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); approved by the U.S. Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905).

[9] A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found evidence of mineralization insufficient to support a finding of a discovery. United States v. Woolsey, 13 IBLA 120 (1973).

Appellants contend, however, that a prima facie case has not been established, because the Government witness did not make tests which could disclose that the land was nonmineral in character. Mere "sniping" of the area, appellants argue, is insufficient to disclose minerals found at lower levels.

[10] United States v. Woolsey, *supra*, answers this argument at page 123: "In no case will the Government's mineral examiner be required to perform discovery work for the claimant, to explore beyond the claimant's exposed workings, or to rehabilitate discovery points for the claimant." United States v. Gayanich, *supra*.

The record discloses that the claimants had no open sites for the Government mining engineer to sample. The Government has established its prima facie case. The burden of going forward shifts to claimants to establish affirmatively that a discovery has been made. United States v. Woolsey, *supra*.

Appellants have failed to meet this burden. Indeed, the appellant Paul Fisher testified that he had recovered only "a few dollars worth" of gold in all the years he owned the claim.

Appellants' grounds for appeal are without merit.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

